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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. [redacted] 42

FARMERS GRAIN COMPANY, a Corporation, et al., (see No. 21)
Petitioners,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, LOCAL LODGE NO. 926, et al., and TOLEDO, PEORIA & WESTERN RAILROAD, a Corporation,
Respondents.

PETITION OF PLAINTIFF-SHIPPERS FOR WRIT OF CERTIORARI

and

BRIEF IN SUPPORT THEREOF.

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OCTOBER TERM, 1946.

No. 908.

FARMERS GRAIN COMPANY, a Corporation, et al.,
Petitioners,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, LOCAL LODGE NO. 926, et al., and TOLEDO, PEORIA & WESTERN RAILROAD, a Corporation,
Respondents.

PETITION OF PLAINTIFF-SHIPPERS FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Farmers Grain Company, a corporation, et al. respectfully shows to this court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This petition is for a review of a Seventh Circuit Court of Appeals judgment reversing an order of the District Court appointing a receiver to operate the Toledo, Peoria & Western Railroad. The Circuit Court of Appeals held that petitioners-plaintiffs had established a cause of action against the railroad, but that the District Court had awarded them the wrong remedy. The Circuit Court of Appeals after reversing the District Court ordered that a mandatory injunction issue against the railroad ordering it to furnish rail transportation instead of operation by a receiver as an officer of the District Court.

SUMMARY AND STATEMENT.

Suit was commenced in the District Court by 19 plaintiffs for themselves and all others similarly situated. The defendants were the Toledo, Peoria & Western Railroad and 13 Railroad Brotherhoods and some individual union officials.

The suit prays for equitable relief to compel the railroad to fulfill its legal obligations under the Interstate Commerce Act, i. e., to supply rail transportation to plaintiffs and the public. Plaintiffs recommend the appointment of a Receiver as an adequate remedy to achieve the ultimate object of rail service.

On October 1, 1945, the Toledo, Peoria & Western Railroad ceased to operate. This railroad extends through a rich farming country from Effner, Indiana, across Illinois to Keokuk, Iowa. As a result hardship and distress came to many small towns, farming communities and businesses which were totally dependent on it for rail transportation.

The shutdown came when the railroad was returned to its private management after it had been taken over by the government on March 21, 1942.

This railroad corporation with a view to its ownership and management is unique. One person, George P. McNear, Jr., is the only individual who has anything to say about the policies of this railroad. He personally or through a holding company owns practically all of its stock, is its president and a director. The other two directors are his stenographer and trainmaster. One share of stock stands in the name of each, and these certificates at McNear's request have been signed and returned to his possession. As a result he has absolutely controlled all

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labor relations on this railroad and his own particular views on this subject have always prevailed with a resulting history of strife.

This court previously had before it the earlier history of this railroad in Toledo, Peoria & Western Railroad v. Brotherhoods, 321 U. S. 50. In that case, this court considered the early labor difficulties which resulted in a shutdown of this same railroad when a few days after Pearl Harbor and after the unions had postponed a strike, the railroad owner, George P. McNear, Jr., ordered into effect his own rules and working conditions which had been in controversy for some time, and which brought about a strike on December 29, 1941. The evidence in this case contains this and further evidence. Thereafter and during the early part of 1942, the railroad owner continuously refused to arbitrate this dispute. On January 22, 1945, according to the testimony of one of his then employees, McNear stated: "Before I will sign a union contract, I will leave town with what I have got tied in a handkerchief on a stick over my back." McNear denied saying this.

Appeals were made to him by the Director of the Office of Defense Transportation and by the War Labor Board, both of which he rejected. Finally, President Roosevelt himself personally appealed to him to arbitrate the dispute, but McNear rejected his request although the employees had agreed to arbitrate. Finally, by Executive Order dated March 21, 1942 in which there was a finding that there had been "an interruption of transportation of goods essential for the prosecution of the war" the President took over the railroad for the United States "in order to assure successful prosecution of the war".

After the railroad was taken over by the Federal Manager agreements were made with the various classes

of employees. These were substantially the same rates of pay and working conditions in effect on all other railroads in the United States and under them the railroad was operated satisfactorily for 3½ years at a profit of seven million dollars.

On September 6, 1945, the Office of Defense Transportation issued an order terminating government control as of October 1, 1945. By letter of September 13, 1945, the different Brotherhoods representing the men then working on the railroad requested that McNear make agreements with them on the same basis as the Federal Manager had operated. They accordingly requested a meeting on September 19th to discuss the subject. In reply by letter of September 15th, the railroad refused even to meet with them. After this, the employees on September 26, 1945, voted not to continue in service after October 1, 1945. On September 28, 1945, the railroad put into effect its embargo on all shipments over its line effective October 1st. On Saturday, September 29th, McNear by his present attorney sent a letter to the Brotherhood officials containing certain proposals which were rejected as unacceptable. Consequently on October 1, 1946 the railroad shut down with 160 freight cars remaining idle on the sidings.

All efforts to effect a settlement thereafter failed, and 19 shippers who were daily sustaining heavy financial loss and hardship, came to the District Court with the plea that the federal courts afford them relief. After an exhaustive hearing in which 200 witnesses testified the District Court held the shippers and the public were entitled to relief against the railroad and after seeing and hearing the witnesses and with knowledge of the personalities involved together with all the other peculiar facts and circumstances of the case, he decided that the most

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practical and effective way to bring about rail service was by court operation through a receiver.

The Circuit Court of Appeals held that the shippers and the public had proved a cause of action against the railroad. Indeed, the railroad itself in its brief in this court concedes relief should be granted against it. At page 5 it states:

> "... but there can be no denial of the right of the shippers to such relief."

Further on the same page it stated it is unwilling to object to a mandatory injunction against it

> "for the wrong done to the shipping public."

On page 6 the railroad further states that the case involves only

> "The difference of opinion as to which remedy is to be afforded for the paramount right of the shipping public."

It further states at page 8:

> "Respondent shippers have no interest whatsoever in any labor dispute between Petitioners and Respondent Railroad, nor in the terms of any settlement between them."

The only question in issue then, is the form of relief to be granted. It is our contention that the form of remedy to be granted is a discretionary matter with the District Court which the Circuit Court of Appeals should not have set aside in the absence of a showing of abuse of discretion.

The railroad states on page 5 of its brief that

> "experience has shown that complete service can be furnished under the mandatory injunction".

This, of course, is a statement of matters outside this record and occurring after this case had been decided by the Circuit Court of Appeals. No doubt it will be disregarded by this court. However, we do not wish to allow it to stand unchallenged and consequently wish to deny that complete service has been furnished. In our opinion and in the opinion of the District Court, operation by a receiver is the only practical and effective way under the facts and circumstances of this case to restore complete rail service to the public.

OPINIONS BELOW.

The opinion of the District Court appears in 66 F. Supp. 845 and the Circuit Court of Appeals in 158 F. (2d) 109.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925, Ch. 229, Section I, 43 Stat. 938 (U. S. C. A., Title 28, §347), providing for review by this Court by certiorari.

THE QUESTIONS PRESENTED.

1. Whether in the exercise of its judicial discretion it was proper for the District Court to remedy an admitted wrong—failure of a railroad to furnish rail transportation as required by the Interstate Commerce Act—through the appointment of a receiver to operate and provide such transportation.

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REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals rendered a decision which is in conflict with decisions of this and other federal courts in seriously curtailing the inherent power of a court of equity to grant an effective remedy to meet any situation.

2. The Circuit Court of Appeals has rendered a decision in conflict with applicable decisions of this and other federal courts holding that the question of the appointment of a receiver is a discretionary one with the chancellor which will not be set aside unless there is an abuse of discretion.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this court for its review and determination the transcript of record filed therein in this cause below, and that said judgment may be reversed by this court and that the judgment of the District Court may be affirmed.

FARMERS GRAIN COMPANY, a Corporation, et al.,

JOHN E. CASSIDY,
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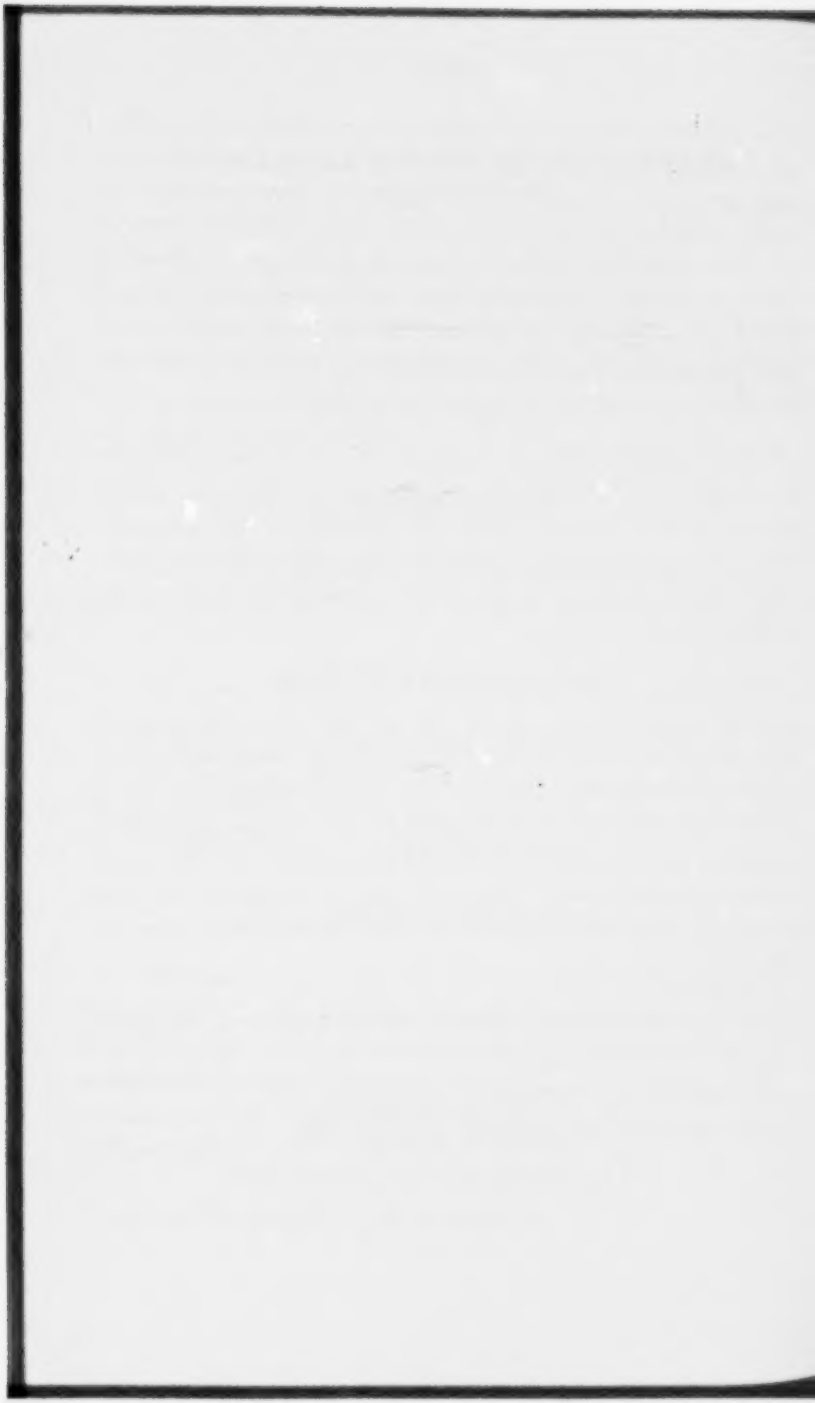

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BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, LOCAL LODGE NO. 926, et al., and TOLEDO, PEORIA & WESTERN RAILROAD, a Corporation,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The citations of these are: District Court 66 F. Supp. 845; Circuit Court of Appeals 158 F. (2d) 109.

JURISDICTION.

The grounds of invoking this court's jurisdiction are stated in the petition.

STATEMENT OF THE CASE.

A statement appears in the petition which will not be repeated here.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court appointing a receiver to bring about a resumption of rail transportation as guaranteed to the public by the Interstate Commerce Act.

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ARGUMENT.

The Circuit Court of Appeals used practically the whole of its opinion in discussing the railroad's labor policy. It so passed over the real question involved—the rights of plaintiffs and the public—that Judge Major in his dissent stated 158 F. (2d) at page 120:

> "The majority opinion, so I think, places too much stress upon the labor controversy existing between the railroad and its employees and fails to ascribe sufficient importance to the rights of the plaintiffs, the shippers, for whose benefit and on whose behalf the law imposes a positive duty to provide and furnish transportation."

The railroad in its brief in this court in opposition to the unions' petition concedes as pointed out in the Statement that the public has been wronged and that the shippers and others have a right to a remedy against it to restore rail transportation. The case thus narrows down to whether the District Court properly appointed a receiver in this case.

The Circuit Court of Appeals in one short paragraph of two sentences disposed of the question here involved by saying a receiver could not be appointed here because his appointment was not limited as to time and was not ancillary to other relief.

This is a suit in equity guided by the old basic fundamental principles one of which is that equitable remedies are flexible and courts are not restricted by legal formula in granting equitable remedies.

In Union Pacific R. Co. v. Chicago, R. R. & P. R. Co., 163 U. S. 564, this court, speaking through Chief Justice Fuller, stated at p. 601:

> "It must not be forgotten that in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well stated, equity has contrived its remedies 'so that they shall correspond both to the primary right of the injured party and to the wrong by which that right has been violated' and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of progressive social conditions in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly permitted.' Pom., Eq. Jur. 111."

In Alexander v. Hillman, 296 U. S. 222, 80 L. Ed. 192, this court, speaking through Justice Butler, stated at p. 239:

> "Treating their established forms as flexible courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights to all the parties before them."

And in Keystone Driller Co. v. General Excavator Co., 290 U. S. 240, 78 L. Ed. 293, this court again stated as to courts of equity:

> "They are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion."

Furthermore, the extent to which a court of equity will grant or adapt its remedies is guided by the public interest involved.

In U. S. v. Morgan, 307 U. S. 183, 83 L. Ed. 1211, this court, speaking through Justice Stone, stated:

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> "It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved."

In Jay v. City of St. Louis, 138 U. S. 1, 34 L. Ed. 843, this court stated at p. 47:

> "Consideration of the interests of the public are held to be controlling upon a court of equity, when a public means of transportation, such as a railroad, comes into the possession and under the dominion of the court."

In the present case the District Court was sitting as a court of equity. It found, and the railroad so concedes, that a wrong had been committed against the public by the railroad's failure to furnish rail transportation. The District Judge had listened to and observed over two hundred witnesses. From this he was in a position to obtain a better knowledge than a court of appeal as to what remedy would best function with a view to all of the peculiar personalities and facts and circumstances in the case.

The District Court in its finding of fact (No. 2) stated:

> "The court finds the fact to be that George P. McNear, Jr., has at all times controlled and dominated defendant railroad in all respects."

In Rule 52 of the Rules of Civil Procedure it is stated:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."

McNear testified at length in this case. The District Judge had full opportunity to observe him personally to-

gether with all other witnesses. The trial judge had the opportunity to consider the personality and traits of this individual in the light of the peculiar situation on this railroad and the public interest.

This is not a normal railroad corporation. Ordinarily there are various independent directors who operate as checks and balances on the others and upon the officers. In turn the stock is widely held and the opinions and views of many persons enter into the policies of such corporations. If it should occur that the officers or directors in a normal railroad would follow a policy such as here that has resulted in non-operation of the railroad by its officers since 1941, it is not unlikely that the individual or individuals responsible for such a policy would be ousted, and there never would be a situation like that existing in the present case.

This was an element that the District Court had a right to consider in attempting to effectively relieve the hardships of a suffering public. It must have been apparent to the trial judge that as long as McNear with his own peculiar policies had control of the operation of this railroad the public would never get adequate rail service. Consequently the only effective remedy for the public would be to remove the operation of the railroad from his hands. This could only be done by appointing a receiver to take over the operation of the railroad. This in turn would not in any way affect the ownership or title to the properties but at the same time would secure to the public adequate service. The only effect of the receivership would be to oust an individual who the court could only find was incompetent to operate a road of public travel such as a railroad, in which the interests of the public are paramount and to which those of McNear must be subordinated.

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In his written opinion the District Judge points out that a receiver is the only relief that will be adequate. After fully considering everything he stated at page 861:

> "Under these circumstances I see no alternative to the appointment of a receiver."

The Circuit Court of Appeals does not question this finding, but instead lays down as an absolute principle of law that a receiver could never be appointed.

As pointed out above courts of equity are flexible. As stated by this court in Alexander v. Hillman, 296 U. S. 222

> ". . . courts of equity may suit proceedings and remedies to the circumstances of cases . . ."

Consequently when the District Court found that plaintiffs had suffered a wrong which called for a remedy, as a court of equity it could suit its remedy to the circumstances of the case, and use the remedy of a receiver which it found to be the only effective one under the circumstances of this case. The case also had the additional element of involving the public interest which this court stated in U. S. v. Morgan, 307 U. S., would affect it in the "manner of moulding its remedies".

Consequently there was no absolute prohibition against the appointment of a receiver in this case as the Circuit Court of Appeals held.

It is a well settled rule that the question of the appointment of a receiver is one for the discretion of the chancellor and his exercise of such discretion will not be set aside unless it can be said he abused that discretion.

This court in Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339 in considering a request for a receiver stated:

> "Such an application calls for the exercise of judicial discretion."

In the case of Ward v. Central Trust Co., 252 Fed. 127, in hearing an appeal from an order appointing a receiver the Circuit Court of Appeals of the Seventh Circuit stated:

> "Such action on the part of the Court involves the exercise of its discretion depending upon the particular facts and circumstances of each case, and if upon review it does not appear that the court abused its discretion in that regard its action will not be disturbed."

A recent statement of that rule appears in Skirvin v. Mesta, 141 F. (2d) 668 (C. C. A. 10th), page 673:

> "The appointment of a receiver or the refusal to appoint rests in the sound judicial discretion of the trial court, and its action thereon will not be overturned on appeal unless an abuse of discretion is shown."

In Hurwitz v. Hurwitz, 136 F. (2d) 800 (C. of A. D. of C.), in refusing to set aside the appointment of a receiver, the court stated:

> "On this record we cannot say that the lower court abused its discretion in appointing a receiver pendente lite as a conservation measure."

In Kingsport Press v. Brief English System, 54 F. (2d) 497, in ruling on the appointment of a receiver the Circuit Court of Appeals of the Second Circuit stated at page 500:

> "We should not interfere with the exercise of that discretion in the absence of proof of abuse."

In the present case there was no abuse of discretion. In fact the chancellor found that a receivership would be

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the only effective remedy, which finding was not questioned by the Circuit Court of Appeals.

The Circuit Court of Appeals in its opinion cites certain cases of this court as authority for its position that a receiver must always be ancillary to some other relief sought in a suit. Those cases if considered in the light of their respective facts do not lay down any such absolute rule that so restricts a court of equity. In fact as pointed out by the District Court in its opinion this does not appear to be an absolute rule because in many federal cases a receivership was the only relief sought. For example where corporate affairs are so deadlocked by disagreement between stockholders that the corporation cannot function, a receiver as the only relief sought, will be appointed to take over the corporation and operate it until its affairs are so adjusted that it can operate (Saltz v. Saltz Bros., 65 App. D. C. 393, 84 F. [2d] 246). Other examples are cited by the District Court in its opinion.

In the text, Fletcher Cyclopedia of Corporations (Permanent Edition 1932) the author recognizes that some cases lay down as a general rule that a receiver must be ancillary to other relief. He points out the supposed rule is as much breached as observed and when it is recognized courts do not permit it to stand in their way where a receivership is the only adequate remedy in which case they say that such a case is exceptional and the rule therefore does not apply.

In Volume 16 at page 55 the text reads:

> The manner of evading the rule is to say the case is exceptional, or that it is a case of extreme necessity for which there is no other adequate remedy as in case of necessity involving a railroad company or other quasi public corporation or to merely wholly

> disregard and make no reference to the rule or to rely on a statute as changing the rule . . . So decisions that a receiver may be appointed where the corporation ceases to exist or where there are no corporate officers in effect deny this general rule, since in nearly every instance a receiver is the principal relief sought, and the same is true as to decisions holding a receivership proper in case of a deadlock between the officers of stockholders which prevents the carrying on of corporate business.

In the case of Brassey v. New York & N. E. R. Co., 19 Fed. 663, a railroad was placed in receivership on the petition of bondholders although it had not yet defaulted on its obligations and there was no other relief asked except the appointment of a receiver to keep the railroad in operation. It was contended the receivership had to be ancillary to some other relief. In reply to this the court stated at page 609:

> The petitioner's position is that, ordinarily, to justify such an appointment, a case must be pending in which other and principal relief is sought—as to foreclose a mortgage. It is true that in general a receivership is ancillary or incidental to the main purpose of the bill, but it does not follow that where a case is presented which demands the relief which can be best given by a receivership, such relief must be refused, because the time has not arrived when other substantial relief can be asked.

The Circuit Court of Appeals makes reference to the fact that there is no limit of time set for the appointment of the receiver. This, of course, is true in every receivership. In the present case the District Court would have authority to discharge the receiver at any time and would certainly do so when it appeared that the railroad could and would itself furnish adequate rail service to the public.

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CONCLUSION.

It is respectfully submitted a writ of certiorari should issue as prayed.

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